No. 14-86

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education and policy advocacy.[1] *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003). Lambda Legal often is counsel of record or *amicus curiae* in cases posing issues regarding the asserted religious needs of a party. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (*amicus*); *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) (rejecting claim that counseling student's speech and religious exercise rights warranted exemption from university's requirement that she counsel lesbian and gay clients per professional standards) (*amicus*); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) (rejecting claim that nondiscrimination statute infringed physician's speech and religious exercise rights) (counsel). Lambda Legal also is often counsel or *amicus curiae* in cases addressing Title VII's protection of LGBT workers. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (*amicus*); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (brought under 42 U.S.C. § 1983 but decided

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

on Title VII principles) (counsel); *Kastl v. Maricopa Cty. Cmty. College Dist.*, 325 Fed. Appx. 492 (9th Cir. 2009) (*amicus*); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063, 1068 (9th Cir. 2002) (en banc) (*amicus*); *TerVeer v. Billington*, No. 12-1290, 2014 U.S. Dist. LEXIS 43193 (D.D.C. Mar. 31, 2014) (*amicus*); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (counsel). In letters to each house of Congress, and in comments to the Equal Employment Opportunity Commission, Lambda Legal has addressed the failure of some courts to protect the rights of LGBT employees from discrimination based on sex or religion, due to misapplying the law governing Title VII's coverage.

SUMMARY OF ARGUMENT

Would the interests of justice, economy, and clarity be served by a bright-line rule that requires the employee to initiate an interactive process about religious accommodations by informing the employer of his or her religious needs that conflict with the needs or rules of the employer? While the substantive answer to that question may be debatable, this Court's response seems preordained: In the absence of any language in Title VII suggesting that a religious discrimination claim fails unless the employer's actual knowledge of the need for an accommodation comes from the employee, it is up to Congress, not the courts, to superimpose any such requirement on Title VII plaintiffs.

Lambda Legal writes as a friend of this Court to put in context the Tenth Circuit's ruling as part of a disturbing tendency of lower courts to ignore this Court's repeated and often unanimous rulings

striking down judicially-imposed hurdles to claims that fall within Title VII's language, including facially valid claims brought by LGBT workers. If there is one overarching tenet of this Court's Title VII jurisprudence, it is that courts should not superimpose non-statutory rules and prerequisites that have the effect of screening out claims that "meet[] the statutory requirements." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 80 (1998). The related corollary is that a court that applies the literal terms of Title VII to allow a claim that members of Congress may not have envisioned should not be concerned, but commended for doing its job. Again, if there is a concern about unintended consequences, Congress can always respond to those. Yet, time and again, the lower courts ignore this Court's rulings and, with no statutory support, place limits on the claims of Title VII plaintiffs. These courts often explain their limit-setting as serving interests in having "clear rules" or ensuring that courts serve *only* those objectives that a court thinks Congress intended in passing Title VII. *Amicus* respectfully requests that this Court yet again admonish against this judicial practice in the strongest possible terms. This case involves an improper judicial prerequisite that has no basis in Title VII. Indeed, this judicially created hurdle runs counter to both the language and the purposes of the statute because it immunizes an employer's rejection of an applicant based on the employer's assumptions concerning her religion and religious needs, and also immunizes the employer's failure either to accommodate the applicant's actual religious needs or to "demonstrate" that no reasonable

accommodation was possible without undue hardship.

ARGUMENT

I. Title VII Is Devoid Of Any Requirement That The Religious Practice That An Employer Invokes To Disqualify An Applicant Be Specifically Called To The Employer's Attention By That Applicant.

The lower court's ruling proceeds, as many other mistaken Title VII rulings do, with assumptions, generally applicable and appropriate, about what should occur prior to an employee or applicant bringing a Title VII claim. Here, that is an interactive process between an employee and an employer regarding the conflict between the employee's religious needs and the employer's needs or rules – a conflict that, if not properly resolved, can subject the employer to liability under 42 U.S.C. § 2000e(j). *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) ("The employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate an employee's religious observance or practice without undue hardship on the conduct of the employer's business.' 42 U. S. C. § 2000e(j)."). The sponsor of Section 2000e(j) expressed the hope that employers would make accommodations "with 'flexibility' and 'a desire to achieve an adjustment.'" *Ansonia*, 479 U.S. at 68. This Court observed that, to achieve that goal, "'bilateral cooperation is appropriate '" *Ansonia*, 479 U.S. at 69, quoting 118 Cong. Rec. 706 (1972) and *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982). And indeed, this Court's

observation is, if anything, an understatement, given the difficulty of prevailing in court for either the employer or employee who refuses to engage in an interactive process regarding religious accommodations.[2]

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[2] Of course, the fact that an interactive process is not statutorily required does not mean that employers and employees can forego "bilateral cooperation" and still be able to prevail in a religious accommodation lawsuit. Most of the time, the employer refuses to engage in or pretermits an interactive process at its peril. *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1033 (8th Cir. 2008) ("But these decision-makers did not consult local [] managers to determine whether there were additional procedures, formal or informal, that could be employed to help Sturgill avoid Friday work conflicts in the interim."); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490 (10th Cir. 1989) ("Although conceivable," employers escaping liability without an interactive process "will also be rare. We therefore will be 'skeptical of hypothetical hardships.'") (citation omitted); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) ("The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted."); *see generally Toledo*, 892 F.2d at 1490 (pointing out the fact-intensive judicial inquiry an employer will have to satisfy to resolve the "issue of undue hardship without some background of attempted or proposed accommodation"). Similarly, it would be rare for an employee to prevail against an employer's application of a neutral attendance policy if she never initiates an interactive process by informing the employer of temporal work restrictions See *Johnson v. Angelica Unif. Grp., Inc.*, 762 F.2d 671, 673 (8th Cir. 1985) ("Had Johnson informed [a] supervisor of her need for religious accommodation , her employer would have had the chance to explain the absentee policy in relation to Johnson's religious needs, and perhaps work out an arrangement satisfactory to both parties.").

However, the Tenth Circuit has gone too far in converting this Court's observation[3] than an interactive process is "appropriate" into an absolute prerequisite that such a process must occur *and* must be initiated by the employee or applicant herself informing the employer of her religious needs. *See Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) (Title VII's framework "involves an interactive process that requires participation by both the employer and the employee."); *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1125 (10th Cir. 2014) ("we are not convinced that we are at liberty to disregard the plain terms of our *Toledo* and *Thomas* decisions, which place the prima facie burden on the plaintiff to establish that the applicant or employee has initially informed the employer of the conflicting religious practice and the need for an accommodation.") ("*EEOC v. A&F*").[4]

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[3] It is especially inappropriate to rely on this Court's decision in *Ansonia*, as the Tenth Circuit did, as mandating an interactive process, when such a process did occur there and thus the existence thereof was not disputed in that case. In *Ansonia*, the employee offered his proposed reasonable accommodation, and the employer rejected that approach but offered alternative reasonable accommodations. 479 U.S. at 66. The lower court in that case held the employer liable, believing there to be an employer obligation to accept any reasonable accommodation suggested by the employee. *Id.* This Court reversed, holding that an employer discharges its statutory duty by offering a reasonable accommodation for the employee's religious needs. *Id.* at 69.

[4] As explained further *infra*, it is curious that the court below relied on *Toledo* in holding that there *must* be an interactive process (and that the employee must initiate it) when *Toledo*

The lower court decision makes this mistake by not analyzing the statutory language at all, but merely mentions it in passing reference.[5] There is no requirement in the statute's language that there be an interactive process, let alone a requirement as to who initiates that process or how it must be initiated. The requirement that the employer be aware of the conflict between its needs and the employee's religious needs stems from the statutory requirement of a showing that the employer acted because of the employee's religion; the courts that have actually addressed the issue have found that element satisfied by evidence that the employer had sufficient information, from any source, to be aware

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rejected an argument that the employer always loses if it does not engage in an interactive process. *Toledo*, 892 F.2d at 1489 ("it is certainly conceivable that particular jobs may be completely incompatible with particular religious practices. It would be unfair to require employers faced with such irreconcilable conflicts to attempt futilely to resolve them."). In *Toledo*, the applicant informed the employer during the interview "that he was a member of the Native American Church, and had used peyote as part of church ceremonies. Toledo described the purpose of the ceremonies, and indicated he had used peyote twice in the previous six months." 892 F.2d at 1484. In response, neither the interviewer, nor the director of personnel with whom the interviewer spoke "discussed or attempted accommodation of Toledo's religious practices" at any time before Toledo filed an administrative claim in response to being told he would not be hired. *Id.*

[5] The only citations to Title VII provisions in the opinion below are the description of the complaint filed in the action and a mere recitation, without analysis, of the antidiscrimination and accommodation commands and the definitions of "religion" and "agent." *EEOC v. A&F*, 731 F.3d at 1110, 1116, 1120, 1125 n.8.

of the conflict.[6] And the absence of an absolute prerequisite of an interactive process goes both ways, as reflected in the universal recognition, consistent with the language of Title VII, that an employer can defeat a claim of religious discrimination, even without engaging in any process, if it shows that all possible accommodations of the religious need would cause it an undue hardship. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 132-133 (1st Cir. 2004) (if the only accommodation acceptable to the employee "would impose an undue hardship on" the employer, it "has no obligation to offer an accommodation before taking an adverse employment action.").[7]

Thus, the lower court's imposition of a requirement that an interactive process must occur and must be initiated by the employee or applicant—whether or not she is informed that she is being rejected because of assumptions about her religious practices—was improper. Any immunizing of a failure even to attempt to accommodate religious needs that the employer knows about – from any source – contravenes Title VII's requirement that the

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[6] *See, e.g., Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1158 (1996); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999).

[7] *Accord Weber v. Roadway Express, Inc.*, 199 F.3d 270, 275 (5th Cir. 2000); *Balint v. Carson City*, 180 F.3d 1047, 1052 n.4 (9th Cir. 1999) (Title VII does not require "such an effort if the employer can show that any accommodation would impose an undue burden."); *Toledo*, 892 F.2d at 1489; *Draper*, 527 F.2d at 520.

employer "demonstrate" that it reasonably accommodated the employee's needs or could not do so without undue hardship. *Ansonia*, 479 U.S. at 68. This Court has been clear that the use of the word "demonstrate" means what Congress said it means – no less and no more. *Desert Palace v. Costa*, 539 U.S. 90, 99 (2003) ("Title VII defines the term 'demonstrates' as to 'meet the burdens of production and persuasion.' § 2000e(m)."). In a religious accommodation case, the burden, per statute, is on the employer.

It also cannot be ignored, especially here, that the interactive process contemplated by the courts is applicable when *the employee seeks an accommodation* such as an exception to an employer's explicit, generally-applicable policy or scheduling. EEOC Compliance Manual § 12-IV. OVERVIEW ("An applicant or employee *who seeks* religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work.") (emphasis supplied); *see also Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013) ("an employee *who wants to invoke* an employer's duty to accommodate his religion under Title VII must give the employer fair notice of his need for an accommodation and the religious nature of the conflict.") (emphasis supplied). That is not the case here, as applicant Elauf affirmatively had been led to believe, prior to her interview, that wearing a headscarf was not a problem, a belief only reinforced by her wearing a headscarf during her interview, being informed of various dress restrictions, but not being told of any

concern with headscarves. *EEOC v. A&F*, 731 F.3d at 1113.

But even in the case of an employee affirmatively seeking an exception from a known, generally-applicable rule, "No 'magic words' are required to place an employer on notice of an applicant's or employee's conflict between religious needs and a work requirement." EEOC Compliance Manual at § 12-IV(A)(1). "[T]he applicant or employee must provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." *Id.* While the Tenth Circuit repeatedly seized on the "employee must provide" language in the Compliance Manual, see *EEOC v. A&F*, 731 F.3d at 1135, 1136, 1139, the EEOC manual only requires an applicant to "provide enough" information; it nowhere says that the applicant has to "convey herself, and not through others, specific and definitive verbal" information. If wearing a headscarf to an interview with an employer who forbids headscarf wearing in the workplace is not "provid[ing] enough information" about a potential conflict over such a ban, it is hard to imagine what is.

II. The Tenth Circuit's Decision Has The Effect Of Disqualifying A Claim Where The Employer Has Not Discharged Its Statutory Burden Of Demonstrating Either That It Offered A Reasonable Accommodation Or That It Could Not Do So Without Undue Hardship.

A court is obligated to entertain any Title VII claim that meets the statutory requirements. A court cannot invoke its preferred rules, or even a preference for clear rules, to reject a claim falling within Title VII's terms. And this Court has unanimously condemned the practice of trying to divine what Congress specifically intended to accomplish by passing Title VII, and allowing only claims consistent with that supposed vision and rejecting other claims that the words of Title VII encompass. The lower court ruling runs afoul of these basic principles.

a. The Tenth Circuit Decision Runs Afoul Of *Oncale*'s Command That Courts Entertain All Claims That "Meet The Statutory Requirements" Of Title VII.

"It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) (citing *Oncale*). This Court unanimously held in *Lewis* that, if applying the textual words of Title VII leads to a situation where "Congress allowed claims to be brought against an employer" in an expansive fashion, and "that effect was unintended, it is a problem for congress, not one that federal courts can

fix." 560 U.S. at 216. *Lewis* and *Oncale* reflect the holding of a prominent early case that this Court has lauded and followed repeatedly,[8] in which the Fifth Circuit recognized that the broad scope of Title VII should not be judicially limited: "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow." *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).[9]

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[8] *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-67 (1986); *see also Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2440-2441 (2013) (describing *Rogers* as "the leading case" and characterizing the Court's holding in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) as "[c]onsistent with *Rogers*").

[9] Neither this case nor the issue of Title VII's coverage of sexual orientation or gender identity discrimination implicates an arguable concern that a literal reading of the statute affirmatively *subverts* the intent of Congress, as opposed to merely having the possibility of *unintended* consequences. *Cf. King v. Burwell*, 759 F.3d 358, 375 (4th Cir. 2014) ("The IRS Rule avoids both these unforeseen *and undesirable* consequences and thereby the true purpose and means of the Act.") (emphasis supplied), *cert. granted*,; 2014 U.S. LEXIS 7428 (November 7, 2014).

b. Courts Cannot Screen Out Claims Falling Within Title VII's Terms By Imposing Their Own Preferred Limitations, Regardless Of Interests In Having "Clear Rules."

Some courts have articulated blanket rules, unsupported by Title VII, that had the effect of potentially immunizing discriminatory conduct. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-458 (U.S. 2006) (per curiam) (unanimously rejecting circuit court's ruling that the decisionmaker's reference to each black plaintiff as "boy" was "not evidence of discrimination" as a matter of law); *id.* at 456-57 (castigating as "unhelpful and imprecise" the lower court's requirement that, to "infer[] pretext from superior qualifications," the disparity had to be "so apparent as virtually to jump off the page and slap you in the face.") (internal quotations and citations omitted); *see generally Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011) (unanimously rejecting, under statute "very similar to Title VII," the lower court's unduly narrow view of bias as "motivating factor" in termination). In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), this Court unanimously cast aside the law of no fewer than four circuits that had held that a plaintiff must present "direct evidence" to establish "mixed motive" liability. *See id.* at 95 (citing cases). Similarly, in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), this Court unanimously rejected the Second Circuit's use of a heightened pleading standard for Title VII cases. *See id.* at 515; *see also Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007) (under *Swierkiewicz*, a plaintiff need not "allege 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to

relief."). While *Swierkiewicz* discussed the Second Circuit's erroneous interpretation of the Federal Rules of Civil Procedure, the decision also explained another fundamental error wrought by approving the dismissal of the allegations: "they state claims upon which relief could be granted under Title VII and the ADEA." *Swierkiewicz*, 534 U.S. at 514. In *Reeves v. Sanderson Plumbing Products, Inc.*, this Court unanimously held that an employee is entitled to a jury if the employee refutes the employer's pretextual reason(s), pointing out that "[t]o hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review." 530 U.S. 133, 148 (2000); *see also Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851 (9th Cir. 2002) (en banc) (accurately depicting *Oncale* as "[s]ticking to the statutory wording in reject[ing] various circuits' special requirements for same-sex sexual harassment cases."), *aff'd*, 539 U.S. 90 (2003).

This Court also has been met with pleas that some judge-made constraints on Title VII's scope are necessary in the interest of having "clear rules" that will serve the interest of judicial economy. Those arguments have been summarily rejected. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011) ("a preference for clear rules cannot justify departing from statutory text."); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 406 (2008) (EEOC filings "should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies. Construing ambiguities against the drafter may be *the more efficient rule* to encourage precise expression in other contexts; here, however, the rule would undermine the remedial scheme Congress

adopted.") (emphasis supplied). Thus, while clarity and judicial economy may be served by a clear, inflexible rule that an applicant or employee herself must always articulate the conflict between her religious needs and an employer need or policy, any imposition of such a rule would have to come from Congress, not the courts.

c. Courts Cannot Screen Out Claims Falling Within Title VII's Terms To Serve Policy Interests, Even Those They Deem In The Contemplation Of Congress.

To the extent that the Tenth Circuit relied on certain policy objectives for its ruling (such as not having employers probe into religion, a "uniquely personal and individual matter," see *EEOC v. A&F*. 731 F.3d at 1117, 1132), the decision below fares no better and indeed seems in defiance of this Court's unanimous rulings in *Oncale* and *Lewis*.

In the formerly influential same-sex harassment case of *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988),[10] the district court held that, even though a "wooden application of" the statutory words "because of such individual's sex" would lead to recognizing same-sex sexual harassment claims, the court "chooses instead to adopt a reading of Title VII consistent with the underlying concerns of Congress" that did not involve such claims. *Id.* at 1456. This

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[10] *See Williams v. District of Columbia*, 916 F. Supp. 1, 8 (D.D.C. 1996) (observing that courts that "have found that same-sex sexual harassment is beyond the reach of Title VII . . . all rely, directly or indirectly, upon the reasoning of *Goluszek*.")

Court unanimously rejected this policy-driven approach to interpreting Title VII in *Oncale*. Conceding that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," this Court held that that was not the proper inquiry. 523 U.S. at 79. Instead, *Oncale* pointed out that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

Thereafter, this Court in *Lewis* echoed the tenet that, when a claim falls within the reach of the statute, it should be allowed irrespective of policy-based warnings of adverse consequences. *Lewis*, at 216 (dismissing concerns about employers facing "new disparate-impact suits for practices they have used regularly for years" and the unavailability of "[e]vidence essential to their business-necessity defenses").

This Court also has rejected the notion that Title VII is concerned only with fair treatment, in the aggregate, of certain groups, such as African-Americans or women. For example, this Court rejected an employer suggestion that the claims of individual African-Americans could be dismissed if the employer showed that it generally had treated blacks fairly.

> Having determined that respondents' claim comes within the terms of Title VII, we must address the suggestion of an additional burden on plaintiffs or in the nature of an affirmative defense [for an employer]

> hiring or promoting a sufficient number of black employees to reach a nondiscriminatory 'bottom line.' We reject this suggestion, which is in essence nothing more than a request that we redefine the protections guaranteed by Title VII.

Connecticut v. Teal, 457 U.S. 440, 452-453 (1982); see also *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978) (rejecting higher pension plan payments for women, despite "unquestionably true" supporting actuarial data, because the statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin."), quoting 42 U. S. C. § 2000e-2 (a)(1) (emphasis added by Court).[11]

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[11] But the lower court here is not alone in improperly rejecting a Title VII religion claim in service of a perceived policy objective or intention of Congress. In *Prowel v. Wise Bus. Forms, Inc.*, 579 F.2d 285 (3d Cir 2008), the court acknowledged that "Title VII seeks to protect employees from forced religious conformity." 579 F.3d at 292 (citing cases). However, the court then held that where the employee can "identify just one" religious belief he did not live up to – "that a man should not lay with another man," then the Title VII claim fails. *Id.* at 293. The court proffered only one reason to reject what otherwise it recognized as a theoretically sound claim of religious discrimination: an intent by Congress, manifested nowhere in the language of Title VII, to foreclose all employment discrimination claims based on sexual orientation. *Id.* ("Given Congress's repeated rejection of legislation that would have extended Title VII to cover sexual orientation, we cannot accept Prowel's de facto invitation to hold that he was discriminated against 'because of religion' merely by virtue of his homosexuality.") (citation omitted). So, a decade after

III. The Enactment Of The 1991 Civil Rights Act And The Americans With Disabilities Act In 1990 Illuminate The Error.

This Court has placed great weight on the significance of what amendments were and were not made in the Civil Rights Act of 1991 ("the 1991 Act."). *Univ. of Texas Southwestern Med. Center v. Nassar*, 133 S. Ct. 2517 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). Especially significant in *Nassar* was the 1991 Act's failure to amend Title VII's anti-retaliation provision a year after Congress passed the Americans with Disabilities Act with very specific anti-retaliation provisions. 133 S. Ct. at 2531. Indeed, as a general matter, this Court has been notably hesitant to adopt

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this Court unanimously decreed in *Oncale* that courts should not attempt to discern what the 88th Congress wanted to cover and not cover in passing Title VII, the Third Circuit did exactly that, and then doubled down by relying on what subsequent Congresses did *not* do, ignoring this Court's repeated admonitions to the contrary. *E.g., Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("'[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress" especially concerning "a proposal that does not become law.") (internal citations and quotation marks omitted). At least three other circuits erroneously have cited the motivations of the 88th Congress and the inaction of Congress thereafter in similarly constraining Title VII's scope. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Vickers*, 457 F.3d at 765; *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005)). However, other courts have correctly realized that courts should not impose exceptions to Title VII's coverage. *Hall v. BNSF Ry. Co.*, No. C13–2160 RSM, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014); *TerVeer v. Billington*, No. 12-1290, 2014 U.S. Dist. LEXIS 43193 *40 (D.D.C. Mar. 31, 2014); *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152, 1156 (N.D. Cal. 2001).

an employer's proposed, limiting statutory interpretation that Congress readily could have adopted but did not. *See, e.g., Thompson*, 131 S. Ct. at 869-870 (rejecting contention that "'person aggrieved' refers only to the employee who engaged in the protected activity. We know of no other context in which the words carry this artificially narrow meaning, and if that is what Congress intended it would more naturally have said 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved.'"); *Desert Palace*, 539 U.S. at 99 ("If Congress intended the term "'demonstrates'" to require that the "burdens of production and persuasion" be met by direct evidence or some other heightened showing, it could have made that intent clear by including language to that effect in § 2000e(m). Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42."); *United Steelworkers v. Weber*, 443 U.S. 193, 205 (1979) ("Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have provid[ed] that Title VII would not require *or permit* racially preferential integration efforts" as opposed to merely using the word "require") (emphasis supplied).

Relevant here, and for LGBT employees, is the fact that the ADA included a provision requiring employers to accommodate "known physical or mental limitations" and an exclusion that "disability" would not include homosexuality or gender identity disorder. The failure to include either provision in the 1991 Act strongly indicates that there is no

"actual knowledge" requirement to trigger the employer's religious accommodation obligation, and that any individual experiencing mistreatment that would not have occurred but for his or her sex or religious nonconformity has a claim, even if that individual's sexual orientation or gender identity motivated the sex or religious discrimination.

In 1990, Congress passed the Americans with Disabilities Act. The ADA incorporated Title VII in significant parts. See 42 U.S.C. § 12117 ("The powers, remedies, and procedures set forth in section[s] 2000e-5 of this title shall be the powers, remedies, and procedures this title provides to the Commission or to any person alleging discrimination on the basis of disability"). The ADA also included its own reasonable accommodation requirement, making an employer liable for "not making reasonable accommodations to the known physical or mental limitations" of a qualified employee with a disability unless it demonstrates undue hardship. 42 U.S.C. § 12112(b)(5)(a). By contrast, 42 U.S.C. § 2000-e(j) contains no requirement that the employee's religious needs be known, but that implicit prerequisite flows from the need to demonstrate discrimination because of religion. But that implicit requirement should not be more demanding than the specific limitation of "known," in the ADA, especially given the 1991 Act's failure to amend Section 2000-e(j). And even the ADA standard has not been onerous, in keeping with the general understanding of the word "known"; *i.e.*, it has not been construed to mean "known to a certainty" or "known to the employer by virtue of the employee's specific verbal articulation thereof." *See, e.g., Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 997

(D. Or. 1994) ("statute does not require the plaintiff to speak any magic words. The employee need not mention the ADA or even the term 'accommodation.'"); *see also Bultemeyer v. Ft. Wayne Community Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist); *McGinnis v. Wonder Chemical Co.*, 1995 U.S. Dist. LEXIS 18909 (E.D. Pa. 1995) (E.D. Pa. 1995). Thus, the Tenth Circuit was unjustified in rejecting the claim below because of the employer's supposed lack of "such *actual* knowledge that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it." *EEOC v. A&F*, 731 F.3d at 1125 (emphasis in original). This is especially so given that Ms. Elauf *wore a headscarf to the interview* where she was provided a "description of the dress requirements" that did not even mention headscarves. *Id.* at 1113. Moreover, her interviewer "assumed that she was Muslim," and "figured that was the religious reason why she wore her head scarf." *Id.* That assumption, if it was to prompt adverse action by the potential employer, required inquiry and an effort to accommodate if the assumption proved accurate.[12]

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[12] In addition to not adding the "known" requirement to 42 U.S.C. 2000e(j)'s accommodation provision, Congress in 1991 also did not amend Title VII to exclude coverage of sexual orientation and gender identity discrimination, as it had a year earlier in passing the ADA. See 42 U.S.C. § 12211(a) ("For purposes of the definition of 'disability' , homosexuality and bisexuality are not impairments and as such are not disabilities under this Act."); 42 U.S.C. § 12111(b)(1) ("'disability' shall not

include transvestism, transsexualism "). And its failure to add the ADA exception for sexual orientation and gender identity coverage speaks volumes. The 1991 Act took dead aim at the *Price Waterhouse v. Hopkins*, 489 U.S. 228 (1989) decision – but only its mixed motive holding, not its holding that sex discrimination may inhere in an adverse employment action based on the employee's noncomformity with gender stereotypes, see *id.* at 250-51, a holding that obviously has significant implications for lesbians and gay men. Both courts favorable and hostile to Title VII claims by lesbians and gay men have recognized the obvious: "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices," *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006); see also *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) ("'[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.'") (citation omitted); *Kay v. Independence Blue Cross*, 142 F. App'x 48, 51 (3d Cir. 2005) ("The line between discrimination based upon gender stereotyping and that based upon sexual orientation is difficult to draw and in this case some of the complained of conduct arguably fits within both rubrics."); *Partners Healthcare Sys. v. Sullivan*, 497 F. Supp. 2d 42, 44 n.3 (D. Mass 2007) ("Certainly, some discrimination directed towards homosexual employees is based on those employees' non-compliance with associational gender stereotypes."); *Birkholz v. City of New York*, 2012 U.S. Dist. LEXIS 22445 **21-23 (E.D.N.Y. Feb. 17, 2012) ("courts have candidly recognized the analytical difficulties' inherent in distinguishing between "stereotypical notions about how men and women should behave" and "ideas about heterosexuality and homosexuality.") (citation omitted); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) ("Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."). Of course these issues are not presented and should not be resolved here, given that they have not been fully briefed in this case to the Court.

IV. While Employers' Burden Of Religious Accommodation Is Light And Manageable In Practice, It Requires Employers To Engage In An Exchange Of Information And To Consider Options, Which The Tenth Circuit's Newly Invented Rule Improperly Pretermits.

There can be no serious dispute that Congress has banned employment practices that accomplish discrimination "because of" religion by screening out job applicants and employees due to their actual or assumed religious practices when conflict is avoidable through minor adjustment of workplace rules. *See Ansonia*, 479 U.S. at 69. The employer's duty to accommodate is limited, however, and employee requests that impose more than *de minimus* burdens on the employer create "undue" hardship and may be denied. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). But, to assess the burden and discharge even this limited duty, the employer must acquire sufficient information about employee needs to ascertain feasible options. The case law applying the reasonable accommodation requirement shows how readily employers and employees engage in the bilateral cooperation through which Congress intended employers to determine whether they can fashion acceptable accommodations. The Tenth Circuit's approach in this case, by contrast, creates a contrary incentive; it rewards employers that reject applicants and dismiss employees based on religion—including based on unverified assumptions about religious needs—without revealing the religious basis for the rejection, rather than exploring whether a conflict actually exists and, if so,

how the employer could accomplish the "reconciliation of needs" for which Congress created the employer's duty to accommodate. *Id.* (citation omitted).

The required exploration usually requires an exchange of information, regardless of how that is accomplished. For example, in *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004), the exchange involved conversations and written directions to the employee, Peterson, who had posted Biblical passages condemning homosexuality in his work area in plain view of coworkers. Hewlett-Packard reprimanded him, explaining that others found the material hostile and demeaning and that display of such material in the workplace was contrary to the company's diversity policy. Peterson responded that he believed he had a religious duty to prompt a strong reaction from his coworkers to motivate them to reconsider their views. He was given multiple direct instructions to remove the postings, which he defied and then was terminated. His subsequent Title VII religious discrimination claim failed because Hewlett-Packard had engaged in good faith efforts to ascertain and accommodate his religious beliefs and then, in the end, could not do so without undue hardship. As the court explained, the statute does not require employers to "accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce." *Id.* at 607-08. Nor does it require employers "to accommodate an employee's desire to impose his religious beliefs upon his co-workers." *Id.* at 607.

As a general matter, Title VII's duty to accommodate does not prevent employers from forbidding mistreatment of others, even when the motive is religious, as long as they have obtained enough information to determine whether it is reasonably possible to avoid the conflict. In the words of the Fourth Circuit, "[W]here an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place." *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996). In that case, Tulon, the employer, had satisfied its duty once it had been informed that its employees had become distressed upon receiving the religiously motivated letters criticizing their private lives sent to their homes by their co-worker, Chalmers, and then heard from Chalmers her religious reasons for wanting to engage with her fellow employees in this manner. At that point, Tulon was not required to accommodate the religiously motivated practice because, as in *Peterson*, adverse effects on other employees were unavoidable. Likewise, when an employer has come to know that "active recruitment" is part of an employee's religious practice and has gathered information about the effects on other employees, the employer may "restrict workplace proselytizing" because employers need not permit an employee "to impose her beliefs upon her co-workers." *E.E.O.C. v. Serrano's Mexican Restaurants, LLC*, 2007 WL 1063179 *3 (D. Ariz. Apr 5, 2007).

Similarly, once having gathered sufficient information to understand their employees' religious needs and having considered accommodation options,

employers need not permit employees to refuse on religious grounds to perform basic job duties. *See, e.g., Bruff v. North Miss. Health Servs., Inc.*, 244 F.3d 495, 497-98, 500 (5th Cir. 2001) (Title VII did not require accommodation of counselor-employee's request to be excused from counseling patients on subjects conflicting with her religious beliefs where employee's refusal to counsel patients about non-marital relationships meant "she would not perform some aspects of the position itself"); *accord Stepp v. Review Bd. of Indiana Emp. Sec. Div.*, 521 N.E.2d 350, 352 (Ind. 1988) (under analogous state law, rejecting religious discrimination claim of lab technician fired for refusing to do tests on specimens labeled with HIV warning because he believed "AIDS is God's plague on man and performing the tests would go against God's will").

Workplace harassment of LGBT people is widespread and can pose particular challenges both for targets of such misconduct and for employers seeking cooperative workplace relationships.[13] When such harassment is religiously motivated, Title VII's duty to accommodate certainly applies but does not prevent employers from forbidding mistreatment of others as long as the employer engages in a good faith effort to understand the religious employee's needs and to ascertain whether an accommodation of interests is possible. *See, e.g., Peterson*, 358 F.3d at 607-08; *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir.

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[13] *See generally* Jennifer Pizer, et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A.L. Rev. 715 (2012).

2004) (rejecting religious discrimination claim of supervisor terminated for antigay religious harassment of lesbian subordinate contrary to religiously neutral employer policy); *Knight v. Conn. Dep't of Public Health*, 275 F.3d 156 (2d Cir. 2001) (rejecting failure to accommodate claim of visiting nurse who claimed a religious right to engage in antigay proselytizing to homebound AIDS patient); *Moore v. Metro. Human Serv. Dist.*, 2010 WL 3982312 (E.D. La. Oct. 8, 2010) (rejecting failure to accommodate claim of public-employee social worker who demanded right to engage in Christian counseling methods).

Comparing the approaches taken by two large technology companies illustrates the essential nature of the employer's duty to obtain sufficient information to determine whether and how it may be able to accommodate a religious employee's needs while still pursuing its business goals. The *Peterson* court explained that, "[i]n numerous meetings, Hewlett-Packard managers acknowledged the sincerity of Peterson's beliefs and insisted that he need not change them." 358 F.3d at 604. The managers explained that, instead, Peterson simply needed to refrain from specified conduct through which he admittedly intended to, and did, distress co-workers. By contrast, in *Buonanno v. AT&T Broadband, LLC*, the employer was not satisfied with the employee's stated commitment to abide by AT&T's diversity policy and required in addition that Buonanno "'value' particular behavior and beliefs of co-workers." 313 F. Supp. 2d 1069, 1082 (D. Colo. 2004). Although AT&T's managers did engage in communication with Buonanno, they failed to ascertain and respect his actual needs, where doing

so was necessary to discharge the company's duty to accommodate, The lesson for the present case is plain: when on notice about a likely conflict between company policy and an applicant's or employee's religious needs, an employer cannot satisfy its responsibility to try to accommodate those needs, per Congress' explicit command, without pursuing an open exchange of information reasonably calculated to learn what it needs to know about the apparently conflicting interests.

In sum, abundant cases show that the interaction required is straightforward with both parties expected to identify their respective needs using the information each possesses, and with the employer then required to try in good faith to resolve conflicts. When employee demands truly are incompatible with employer needs, employers need only have verified that reconciliation is impossible. Courts for decades have been applying this approach without difficulty and without judge-made limitations on the employer's duty. The Tenth Circuit erred in its invention of a rule contrary to this approach and inconsistent with the text of the statute.

CONCLUSION

Amicus respectfully requests that this Court reverse the Tenth Circuit's erroneous decision and again instruct the lower courts not to impose judicially-created disqualifications on the statutorily sufficient claims of Title VII plaintiffs.

Respectfully submitted,

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